82613-7

NO. 25844-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER LAWRENCE JONES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 05-1-00981-4

BRIEF OF RESPONDENT

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II. QUESTIONS PRESENTED

A. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANT, WHO ALLEGED THE EXISTENCE OF WITNESSES BUT FAILED TO CALL THEM TO TESTIFY, DID NOT MEET HIS BURDEN OF PROOF, AND THUS RENDERED MOST OF THE FACTS REQUIRED TO SUPPORT HIS CONSENT DEFENSE INADMISSIBLE?

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C. WHETHER THE STATE IMPROPERLY COMMENTED ON THE DEFENDANT'S REFUSAL TO VOLUNTEER A DNA SAMPLE WHEN TOLD THAT IT COULD EXCLUDE HIM IF HE WAS IN FACT INNOCENT OF THE CRIME CHARGED.

D. WHETHER THE TRIAL COURT ERRED IN IMPOSING AN AGGRAVATED SENTENCE AFTER THE JURY SUBMITTED A SPECIAL FINDING THAT THE DEFENDANT ABUSED A FAMILIAL POSITION OF TRUST BY RAPING HIS BIOLOGICAL NIECE?

III. STATEMENT OF THE CASE

A. Procedural History

On July 5, 2005, the Benton County Prosecutor charged the defendant, Christopher Lawrence Jones ("the defendant"), with rape in the first degree that occurred on or about June 28, 2005. (CP 1). The victim, Kashauna Dixon ("Kashauna"), is the defendant's biological niece, and did not appear for trial; consequently, a jury acquitted the defendant of that charge but, even without her testimony, was hung on the charge of rape in the second degree. (CP 42). (RP at 10[1]). The prosecutor then successfully persuaded Kashauna to testify in spite of considerable pressure from her family not to, and by way of amended information, charged second degree rape with the aggravating circumstance that as a biological uncle sharing a

[1] For ease of reference, the State adopts Defendant's abbreviations for the Reports of Proceedings: "RP" refers to the Report of Proceedings for September 21-22, 2006, and "2RP" refers to the Report of Proceedings for September 25, 2006, November 13-16, 2006, and January 10-11, 2007.

residence with the victim, the defendant had abused his position of familial trust.[2] (CP 35-36). On November 16, 2006, a jury convicted the defendant of that charge and, by special verdict, found that the defendant had used his position of trust to facilitate the crime. (CP 65). On April 7, 2007, the court imposed an exceptional sentence above the standard range of 146-194 months based on an offender score of six (6), for a minimum term of 242 months of confinement. (2RP at 373). (CP 122). Defendant timely appealed. (CP 88-98).

B. Counter Statement Of The Facts

Before the jury was seated, the court held a hearing to determine what evidence would be admissible during the trial. (2RP at 195). In support of a consent defense (which had emerged around the time that the Washington State Crime Lab reported an unmistakable match between his

[2] Kashauna was seventeen years old at the time; therefore the prosecutor charged abuse of trust rather than particular vulnerability as an aggravating circumstance.

DNA and that found in the sample from Kashauna's rape kit), the defendant made a generalized offer of proof. (2RP at 207-08). He told the court that approximately eighteen (18) hours before Kashauna arrived in the emergency room on June 28, 2005, he had accompanied her and her brother, Josh, to a Pasco truck stop where he had purchased a substantial amount of cocaine from three strangers. (2RP at 210-211). He then invited them back to his temporary home, which he shared with his sister, Abigail Dixon, Kashauna (then age 17), and Josh (then age 19). (2RP at 212-213). He further testified that he and Kashauna, together with the alleged truck-stop-cocaine-dealers, spent the night smoking and snorting that cocaine, consuming alcohol, and engaging in consensual sexual activity. (2RP at 215-216). Which would, he expected, explain why his semen was found in Kashauna's genital area the next afternoon. He stated that Josh was present at this party but did not consume any drugs or

alcohol. (2RP at 212). None of these witnesses, the drug dealers, or sober Josh, would be called to testify in his defense, however.

Still outside the presence of the jury, the State then called Richland Police Officer, Roy Shepherd, lead investigator in the case, who testified that the defendant had never, at any time during the investigation, made mention to him of any party, cocaine purchases, witnesses, drug and/or alcohol consumption by the victim, or consensual sex between any of these people. (2RP at 204-05). So far as he was aware, Detective Shepherd said, the only drugs and alcohol ingested were ingested by the defendant. (2RP at 206). There had never been any indication of drug or alcohol use by the victim at any time. Id. The party-story was news to him as of that morning.

The State then called the victim, Kashauna Dixon. (2RP at 207). Who gave an entirely different account of what occurred. Kashauna testified: (1) that on June 27, 2005 she did not

accompany her uncle to a Pasco truck stop to purchase drugs or for any other reason, (2RP at 208); (2) that she did not consume alcohol, cocaine, or any other drugs that night or the next day, (2RP at 208); (3) that she did not attend any party at her home that night. Id. Later, on direct exam, Kashauna would testify, without rebuttal, that the rape occurred the afternoon of June 28, 2005. In effect, that her uncle had fabricated the story about the orgy-party, the drugs, and the truck stop strangers in order to try to establish, or at least imply, that she had consented to having sex with all of them, including him.

Two absolutely different stories: the victim's version has a good bit of corroboration; her uncle's has none at all. The court ruled from the bench that in the absence of corroborating witness testimony that would have been of obvious and significant exculpatory value to the defendant, (2RP at 222), and because the

defendant had not until then, asserted the existence of witnesses, or provided even their full names, and did not even produce his nephew to testify in his defense, (2RP at 223), the defendant's testimony could only be described as self-serving and thus had not met even the low, preponderance-of-the-evidence burden of proof required to be established by the defendant pursuant to ER 404(b) and case law.[3] (2RP at 223). Therefore, the court concluded, testimony related to the conduct alleged by him was properly excluded. (2RP at 223).

Appellate counsel characterizes the court as "indicating that the threshold was not met because the trial judge did not believe [the defendant]," (Appellant's Brief, pg. 10). But in

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[3] Aggravating circumstances need only be established by preponderance of evidence under the Sentencing Reform Act (SRA). State v. Sanchez, 69 Wn. App. 195, P.2d 735 (1993), State v. Sanchez, (rev. den.) 121 Wn.2d 1031, 856 P.2d 382 (1993). And see, State v. Camara, 113 Wn.2d 631, 639-40, 781 P.2d 483 (1989)(**consent** is an affirmative defense to rape; requiring a defendant to **prove** consent by a preponderance of the evidence does not violate due process).

actuality the court was given no evidence to consider and could not, therefore, have ruled otherwise.

Prior to the first trial, a CrR 3.5 Hearing was held for the purpose of determining the admissibility of the defendant's statements to Officer Shepherd after he refused to volunteer a DNA sample without advice from counsel.

The State generally stipulates to the facts set forth by the defendant as to the CrR 3.5 Hearing (Appellant's Brief, pg. 6-7). Richland Police Detective, Roy Shepherd, testified that he was the lead detective in this matter, (RP at 37), and that he interviewed the defendant on February 18, 2006 at the Benton County Jail. (RP at 38). (2RP at 205). After delivering verbal and written Miranda[4] warnings, and after the defendant signed the standard form indicating that he understood and waived them, (CP 34), (2RP at 256), Officer Shepherd conducted the

[4] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, (1966).

interview. (RP at 39-43). (2RP at 257-259). The defendant denied raping his niece and, in fact, denied ever having intercourse with her. (RP at 43). (2RP at 259-260). In response to the defendant's denial of the charge, Officer Shepherd explained the procedure of taking a DNA sample by way of buccal swab. (2RP at 264). The defendant refused to give the sample without the advice of counsel, (2RP at 264), so Officer Shepherd changed the subject, continued the interview, and afterward sought a search warrant from the Benton County Superior Court for a buccal sample. (2RP at 265). The court granted the warrant and Detective Shepherd obtained the sample. (2RP at 265).

The Superior Court ruled that the defendant had requested legal advice to inform the specific subject of whether or not he should comply with Office Shepherd's request for a DNA sample, and that his written waiver of his right to counsel was knowing, voluntary, intelligent, and

admissible as to the rest of Officer Shepherd's interview. (RP at 59-61 and 63-65). (CP 122-123). Formal findings of fact and conclusions of law were subsequently entered into the record. (CP 122-123).

C. Evidence Excluded As Required by the Rape Shield Statute and ER 401

Months earlier, after the defendant's DNA was determined to match the DNA in the semen obtained during the victim's gynecological exam[5], a consent defense was crafted, albeit in-artfully. Though the defense had failed to submit a written proffer before the second trial as required by RCW 9A.44.020(3)(d), the court nonetheless conducted a lengthy hearing before the jury was seated on the morning of Wednesday, November 15, 2006. (2RP at 195-225).

Faced with a direct DNA match, defense counsel now hoped to establish consent by

[5] "The estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is one in 26 quadrillion." Testimony of Lisa Turpen, forensic scientist, Washington State Police Crime Lab. (2RP at 178).

eliciting testimony from the defendant that Kashauna, his seventeen year old niece, had not only partaken of cocaine and alcohol at a party the night of June 27, but that she also consented to having intercourse with most of those present, including him. Though the defendant maintained that the drug dealers from whom he purchased the night's cocaine were present at this party and could corroborate his account, he had never known their last names, didn't know where to find them, and couldn't therefore be expected to produce them for trial. (2RP 213-215). He also wanted to assert that his adult nephew, Josh (Kashauna's brother), had also been present and sober, (2RP at 212), but Josh wouldn't be called to testify for him, either. This is crux of the consent defense that the defense hoped to lay before the jury.

Approving State v. Posey, 130 Wn. App. 262, 122 P.3d 914 (2005) as representing the appropriate line of cases for the subject at

hand, (2RP at 199), the court ruled that the proffered evidence of sexual conduct with others for the purpose of attacking credibility or proving consent was inadmissible under Washington's rape shield statute. (2RP at 199; 246). Defense counsel objected for the record (without citation) that the court's ruling violated the defendant's constitutional right to confrontation and his right to present evidence. (2RP at 201). The court then ruled that testimony on the issue of consumption of drugs and alcohol as evidence that the victim may have suffered impaired recall, but not as evidence of prior sexual conduct, was admissible. (2RP at 204).

Appellate counsel characterizes the court as "indicating that the threshold was not met because the trial judge did not believe [the defendant]," (Appellant's Brief, pg. 10). But in actuality the court was given no admissible evidence to consider and could not, therefore, have ruled otherwise.

The jury was then seated. Kashauna testified that her maternal uncle, the defendant, had moved into the house she shared with her adult brother, Josh, about one month prior to the rape. (2RP at 225). She testified that he had been her favorite uncle, and that as such she had trusted him. Id. But in the early afternoon of June 28th, 2005 as she was sleeping in her bed, he entered her room, put his hand around her neck, and threatened to kill her if she wasn't quiet. (2RP at 227-230). She then testified that while squeezing her throat, her uncle tore her clothes away and proceeded to rape her. (2RP at 231). She estimated that the rape occurred over a period of about twenty minutes. (2RP at 232).

She called her mother, who came to the house and took her to Kennewick General Hospital's emergency room, where she was seen at about 3:15 by a triage nurse and at about 3:30 by a nurse specially trained to conduct gynecological exams for victims of assault. Officer Troy Glasgow

arrived at the hospital immediately after the exam and gathered just enough information from Kashauna to send other police officers to her home to investigate further. (2RP at 54; 57-60).

Kashauna volunteered no information at that time to Officer Glasgow about what, if anything, transpired in the house immediately after the rape and before her mother arrived to take her to the hospital. Testimony of Kashauna Dixon, (2RP at 238), and of Officer Troy Glasgow, (2RP at 53-54; 296-299). She did not, for example, volunteer that she had thrown both a glass of water and a ceramic mask at a wall, or that her uncle had at one point manhandled her into the kitchen. The defense presents these omissions as inconsistencies in her testimony, (Appellant's Brief pg. 41), but ignores the fact that by Officer Glasgow's own account, he had interviewed Kashauna only for the purpose of getting a quick synopsis of the sexual assault in order that the suspect could be apprehended before he had a

chance to destroy evidence and/or flee. (2RP at 54; 57-60).

Officer Glasgow's instinct seems to have been astute: the premises were unoccupied when the Richland Police Department arrived, (2RP at 58), and the defendant was then unable to be located for the next several months. There should be no surprise that neither a broken water glass nor pieces of ceramic mask were found during the officers' search when the defendant had been alone in the house for some period of time after Kashauna and her mother had gone. Kashauna's mother, or Josh, or anyone else could have innocently picked up the pieces and thrown them away.

Officer Glasgow did, however, find and seize a bed sheet, a blanket, a pair of white shorts, and torn underwear, in the location and in the condition described by Kashauna. (2RP at 77).

Appellant objects on the same grounds to the prosecutor's closing statement, which was

obviously and carefully tailored to the timing of Mr. Jones's decision to stop cooperating with the investigation:

> "When Detective Shepherd said [to the defendant], "How about we get some DNA?", [the defendant answered] "No. No. No. No. *The defendant put the brakes on that right after he said, "I didn't have sex with her. No sexual contact, period."* Why did he say no at that point, Ladies and Gentlemen? You know, you don't have to be real smart to know why. Because he knew. The DNA wasn't gonna lie. The DNA couldn't be manipulated. The family couldn't change the DNA evidence, and [so] he said, "No. You're not gettin' my DNA."

(2RP at 333-34).

The sentences above, in italics, are represented by ellipsis in the appellant's brief. However, they clearly indicate the prosecutor's careful, promised focus on the *timing* of the defendant's silence rather than the *fact* of it. The defendant's choice to reassert his previously waived right to an attorney the moment he realized that he was facing incontrovertible DNA evidence allowed the jury to understand how his defense consent was born. There is no indication

whatsoever that the police or the prosecutor denied the defendant of any of his constitutional rights.

The State also accepts the defendant's recitation of the pre-sentence investigation (PSI) report that was prepared by the Department of Corrections and considered prior to sentencing. According to that report, the defendant was convicted in Washington in 1991 on five counts of delivering cocaine, (CP 87), for which he received a 104 month sentence and was released to community custody in 1998. Id. He was then convicted of burglary in Nevada, for which he was sentenced to an indeterminate sentence of 22-96 months. Id. His parole was revoked in November 2004, Id., and he moved into the house with his niece and her brother, late in May 2005. (2RP at 225). So, as stated by the defendant, the remainder of his sentence was probably about six months. (Appellant's Brief, pg. 17).

At sentencing, the trial court calculated the defendant's offender score to be six, yielding a standard range of 146-194 months. (2RP at 374). The court imposed an exceptional sentence of 242 months, (CP 6), based on several factors which the court enunciated through many pages of consideration before sentencing: the defendant's criminal history as set forth in the PSI, the jury's finding that the defendant abused a familial position of trust, the defendant's high risk of re-offending, and his lack of remorse. (2RP at 371-374).

The trial proceeded. Forensic scientists from the Washington State Crime Lab testified to matching the defendant's DNA to the samples provided to them from Kashauna's rape kit. (2RP at 162; 178). The investigating officers testified, and the registered nurse who performed Kashauna's emergency room examination testified. (2RP at 98-158). Many sidebar discussions were held to argue and reargue the issue of Kashauna's

alleged prior sexual conduct, but the trial court held firmly to Posey's holding and reasoning. As the consent defense crumbled, pretrial, by virtue of the rape shield law, it became apparent that the defendant would not be testifying.

At the end of all the testimony, defense counsel motioned for a mistrial on the grounds that since he was "prohibited" from calling the defendant to testify as to consent, and the court had ruled that uncorroborated testimony alleging insufficient evidence of drug and alcohol abuse to meet his burden of proof for admissibility, he was effectively denied his Sixth Amendment right to confrontation. (2RP at 311). During extended oral argument, this exchange occurred:

> "***The Court***: You can certainly make an argument about the State's burden of proof, but there is no evidence—point me to any evidence in this case that there was consent?
> ***Defense Counsel***: We were prohibited from putting on that evidence, your Honor.
> ***The Court***: Counsel, you were not prohibited from putting on that evidence. I want to make that clear again. You can reiterate that as many

> times as you want, but as a practical matter you may have found that for tactical or strategic reasons you did not want to call your client.
> ***Defense Counsel***: Your Honor, my client couldn't testify about the drug usage--
> ***The Court***: You understand the reason for the court's ruling with respect to his being prohibited from testifying about those matters...My ruling is that you do not have a basis for...affirmatively arguing to the jury that there was consent. You can certainly argue that the State did not prove lack of consent".

(2RP at 311-12).

In short, defense counsel had every opportunity to raise doubt about the victim's credibility without violating the parameters or spirit of the rape shield statue, and he had opportunity to show that the State did not prove lack of consent, but he made tactical and strategic choices that precluded the jury from acquitting the defendant. They found him guilty as charged of second degree rape of his niece.

III. ARGUMENT

A. CHARACTERIZATION OF THE VICTIM'S PRIOR SEXUAL CONDUCT AS CONTEMPORANEOUS DOES NOT MAKE THAT CONDUCT CONTEMPORANEOUS NO MATTER HOW OFTEN IT IS REPEATED: TESTIMONY REGARDING SEXUAL CONDUCT WITH OTHERS FOR THE PURPOSES OF DAMAGING CREDIBILITY OR SHOWING CONSENT IS IRRELEVANT AND WAS THEREFORE PROPERLY EXCLUDED BY THE TRIAL COURT AS INADMISSIBLE UNDER THE RAPE SHIELD ACT.

The appellant asserts that "evidence of Dixon's sex with other men and of her drug and alcohol consumption the night before was crucial to Jones's consent defense. By excluding this evidence, the trial court eviscerated Jones' ability to defend himself and deprived Jones of a fair trial under the state and federal constitutions." (Appellant's Brief pg. 18).

The State respectfully responds, first, that without a written offer of proof showing relevancy and submitted before trial by the

defense, the trial court had no obligation to hold a hearing at all but did so anyway.

Washington's rape shield statute provides in relevant part:

> "Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section..."

RCW 9A.44.020(2).

Subsection (3) provides that evidence of the victim's past sexual behavior (as described above) is admissible on the issue of consent only if specific procedural requirements are met. RCW 9A.44.020(3). The statute requires a *written offer of proof* that a victim's prior sexual history is relevant to the issue of consent. Then, if the trial judge finds the offer of proof to be sufficient, the court must order a hearing outside of the presence of the jury. RCW

9A.44.020(3)(a). At the conclusion of the hearing, if the court finds that evidence offered is relevant to the issue of the victim's consent, that its probative value is not substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice, and that its exclusion would result in denial of substantial justice to the defendant, the court is required to enter an order stating what evidence may be introduced by the defendant. RCW 9A.44.020(3)(d). This court has read RCW 9A.44.020 to mean that "credibility is ruled out altogether as the basis for introducing past sexual conduct and consent is made a suspect justification for the introduction of such evidence." State v. Hudlow, 99 Wn.2d 1, 8, 659 P.2d 514 (1983). RCW 9A.44.020(3).

Second, the constitutionality of Washington's rape shield statute has been challenged on confrontation grounds and upheld repeatedly, because the rape shield statute only

denies defendants the ability to introduce irrelevant evidence. State v. Gallegos, 65 Wn. App. 230, 828 P.2d 37 (1992). In that case as here, the defense hoped to infer if not establish that the victim's behavior earlier in the evening (she admitted to dancing and drinking with the defendant), might at least infer that she had consented to sex with him later on. Id. at 235. As here, the trial court then inquired whether there was any other evidence that the victim had fabricated the incident. Id. As here, defense counsel replied in the negative, but argued that the evidence he sought to introduce should be admitted because it raised the possibility that the victim had fabricated either the entire incident or the severity of it. Id. at 236. As here, defense counsel admitted that there was none. Id. Thus the trial court in Gallegos ruled, as did the trial court here, that uncorroborated testimony regarding consent, especially as it bore on the issue of character, was properly

excluded as impermissible under the Rape Shield Act and irrelevant ER 401. On appeal, the Gallegos appellate court wrote:

> "A criminal defendant has a right to confront and cross examine State witnesses. (citations omitted). However, a defendant has no right to have irrelevant evidence admitted in his or her defense. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Relevant evidence is that which tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence of sexual mores contrary to community standards is inadmissible for the general purpose of attacking a rape victim's credibility, and is admissible to prove the victim's consent only in limited circumstances. RCW 9A.44.020(3); See Hudlow, 99 Wn.2d 1, 8-9. Gallegos, 65 Wn. App. 230 at 237.

Further, the admissibility of evidence of past sexual conduct is within the sound discretion of the trial court. State v. Hudlow, 99 Wn.2d at 17-18, 659 P.2d 514 (1983). According to the procedure adopted in RCW 9A.44.020(3), the defendant must provide a written offer of proof to establish the relevance of the prior sexual

conduct. If the defendant's offer of proof does not establish relevance, then the trial court is not obligated to set a hearing on the issue. This construct and holding were reexamined and reaffirmed quite recently in State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006).

1. Alleged Violation of the Defendant's Right to Remain Silent

Detective Roy Shepherd was the lead investigator in the case. (RP at 37). The prosecutor asked Detective Shepherd about his interview with the defendant, which finally occurred in December 2005, immediately upon the defendant's extradition back to Washington from the State of Texas. Appellant's brief supplies several pages of *verbatim* testimony in which Detective Shepherd testifies to advising the defendant of his Miranda rights, verbally and in writing. (2RP at 256). Both he and the defendant signed Richland Police Department's standard Warning Rights and Waiver form, (2RP at 256),

which was entered into evidence and published as State's Exhibit 9. (2RP at 258). The officer advised the defendant of the nature of the allegation, (2RP at 259; 271-73), to which the defendant responded by denying any sexual contact whatsoever with the victim, his niece. Id. No indication of a consent defense, yet.

Defense counsel then asked for a side bar conference outside the presence of the jury, during which he argued that the waiver was ineffective as to the entire interview because the defendant had asked for an attorney to advise him as to the issue of whether he should provide a DNA sample or not. After brief argument, (2RP at 260-263), the court sustained defense counsel's objection, limiting the scope of the prosecutor's questioning to the *timing* of the defendant's refusal to volunteer a buccal sample rather than the refusal itself. (2RP at 263). Officer Shepherd testified that he specifically asked the defendant to memorialize his own

perceptions and recollections of what, if anything, had transpired with his niece, but the defendant refused. (2RP at 266). The officer stated that he obtained a search warrant for a buccal sample and took the sample from the defendant during his next day on duty. (2RP at 267). The defendant's counsel objects to this narrow testimony, and the prosecutor's recap of it during closing argument, as impermissible comment on the defendant's exercise of his Fifth Amendment right to remain silent. (Appellant's Brief, pg. 16; 35).

But there was no objection from defense counsel at the time because there were no tenable grounds: while it is true that a defendant's unequivocal post-arrest assertion of his Fifth Amendment right to remain silent may not be used to impeach his testimony at trial[6], but here there was not an unequivocal post-arrest assertion

[6] State v. Upton, 16 Wn. App. 195, 556 P.2d 239 (1975); Doyle v. Ohio, 426 U.S. 610, 617, 96 S.CT, 2240, 2244, 49 L.Ed.2d 91, 97 (1976).

after Miranda warnings were given. Where a defendant volunteers a defense to the police (for example, innocence) wholly inconsistent with one interposed at trial (for example, consent), his partial silence "strongly suggests a fabricated defense, and the silence properly impeaches the later defense." State v. Cosden, 18 Wn. App. 213, 220-221, 568 P.2d 802 (1977); and see Doyle v. Ohio, supra.

B. TRUST ENHANCEMENTS IN SEXUAL ASSAULT CASES ARE NOT LIMITED TO DEFENDANTS WHO OCCUPY CARETAKER ROLES FOR YOUNG CHILDREN; APPELLATE COUNSEL HAS MISTAKENLY MERGED THE VULNERABILITY ENHANCEMENT WITH THE TRUST ENHANCEMENT.

A position of trust aggravating circumstance is statutorily as follows: "The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." RCW 9.94A.535(3)(n).

On review of an exceptional sentence, an appellate court uses a clearly erroneous standard to determine (1) whether the reasons for the

exceptional sentence are supported by the evidence, (2) whether the reasons justify departure from the standard range as a matter of law; and (3) whether the sentence is either clearly too excessive or too lenient (the abuse of discretion standard). State v. Branch, 129 Wn.2d 635, 645-46, 919 P.2d 1228 (1996). In this case, the trial court found that the defendant's conduct implicated one aggravating factor supporting an exceptional sentence upward: abuse of a position of trust as defined by RCW 9.94A.535(2)(d)(iv). The State never argued that the defendant had occupied a caretaking role in Kashauna's life that would implicate vulnerability within the meaning of the aggravated circumstance statute.

C. THE STATE CHARGED, AND THE JURY FOUND BY SPECIAL VERDICT, THAT THE DEFENDANT ABUSED A POSITION OF FAMILIAL TRUST BY RAPING HIS SEVENTEEN YEAR OLD NIECE WHILE RESIDING IN HER HOME. THE COURT ACCEPTED THE VERDICT AND IMPOSED AN EXCEPTIONAL SENTENCE THAT REFLECTED THE JURY'S VERDICT.

The defendant makes a few good points on the subject of what it means to occupy "a position of trust." He is correct when he states that it "is not a strict liability sentence enhancement for blood relatives, but instead depends on the facts of each case." (Appellant's Brief, pg. 44). The facts of this case are indeed what made the jury enter their special finding: this defendant, with nowhere else to go, was invited by his sister to share, and ostensibly supervise, a home with her children. As a family member who was many, many years older than Kashauna and her brother, he most certainly exercised adult authority over the household. Over the course of a month, he established a position of trust sufficient that Kashauna's mother allowed him to continue living in the house in her absence. And then one afternoon, alone in the house with his niece and high on cocaine, he raped her and threatened to kill her. His position of trust was facilitated by his residence in the home and by

his *de facto* position of authority there.

The State accepts without argument that a position of trust is not *per se* established by a familial relationship. It is, as the defendant points out, the nature of a particular relationship that establishes trust: its duration and degree. State v. Fisher, 108 Wn.2d 419, 739 P.2d 683 (1987). The Fisher court continued: "A relationship extending over a longer period of time, or one within the same household, would indicate a more significant trust relationship, such that the offender's abuse of that relationship would be a more substantial reason for imposing an exceptional sentence." Id. at 427, emphasis not in original. Here, Kashauna had no real choice but to trust her uncle, since at age 17 she had nowhere else to go and her mother trusted him enough to invite him to live there. There is no evidence that Kashauna was even aware of her uncle's criminal history. Obviously the jury was sympathetic to

the fact that Kashuana was effectively forced to trust her uncle since he assumed a position of authority figure in her home. The Fisher court, also, recognized the difficulty that Kashauna faced.

A second point made by the State is that the trust enhancement is not established by a subjective feeling on the part of the victim. (Citations omitted.) The defendant cites a whole host of case law to support this undisputed point. But the sum of the testimony elicited by the prosecutor as to Kashauna's subjective feelings for her uncle is contained in three lines that were only intended to supplement the other indicia that the defendant occupied a position of trust:

> ***Kashauna***: We were really close. He was my favorite uncle.
> ***Prosecutor***: Did you trust him?
> ***Kashauna***: Yes.

(2RP at 225).

In no way could the jury have based their special verdict on this fact, or even

substantially on this fact, and the testimony was not objectionable on other grounds. There is no hay to be made of this assignment of error.

The jury was instructed that the facts relevant to showing that the defendant abused a position of familial trust must be proven beyond reasonable doubt in order for the jury to return a guilty verdict with this aggravated circumstance. The jury understood the question before them on the special verdict form, "Did the defendant, Christopher Jones, use his position of trust as Kashauna Dixon's maternal uncle, to facilitate the commission of the current offense?" (CP 65), accepted it at face value, and answered in the affirmative. Their verdict should be respected.

V. CONCLUSION

The defendant received a fair, if not perfect, trial. As the trial court held, the evidence supports the jury's guilty verdict

including the aggravated circumstance that Christopher Jones abused a position of familial trust by raping his niece. The State respectfully asserts that conviction and sentence should be affirmed.

Respectfully submitted this 22nd day of January, 2008.

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Ofc. Id. 91004